IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Docket No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation, *Petitioner*,

AGAINST

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS AND MARCELLE KREISCHER, *Respondents*.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF MARGARINE MANUFACTURERS (AMICUS CURIAE ON BEHALF OF PETITIONER).

ASHLEY SELLERS
JESSE E. BASKETTE
1625 K Street, N. W.,
Washington 6, D. C.
Attorneys for National Association of Margarine Manufacturers

GEORGE C. DAVIS
1625 K Street, N. W.
Washington 6, D. C.
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Docket No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation, *Petitioner,*

AGAINST

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS AND MARCELLE KREISCHER *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF ON THE NATIONAL ASSOCIATION OF MARGARINE MANUFACTURERS AS AMICUS CURIAE.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The National Association of Margarine Manufacturers hereby respectfully moves for leave to file a brief, appended hereto, as *amicus curiae,* in support of

the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner has consented to the filing of this brief *amicus curiae*. Respondent has refused to consent.

The National Association of Margarine Manufacturers is a nonprofit trade association organized under the laws of the State of Illinois. Its members include a substantial number of the manufacturers of margarine which is produced and sold through the channels of interstate and intrastate commerce. Many of its members engage in multi-state operations, having one or more manufacturing plants located throughout the United States. One of the principal purposes of the Association is to express the views of its members with respect to matters of mutual interest concerning the operations of the Federal and state governments. This includes judicial decisions affecting the industry.

The decision of the United States Court of Appeals is of direct concern to the members of the Association. They are keenly interested in problems of labor and management, including the making of employment contracts and collective agreements through the bargaining process.

The dispute in the case at bar centers around the scope of the seniority provisions of a particular collective bargaining agreement made between petitioner and General Warehousemen's Union Local 852 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The issues are whether those rights of seniority (1) survived the termination of the collective bargaining agreement and the employment relationship between petitioner and

the respondents and (2) were transferrable to another plant of the petitioner at which its employees are represented by another Union.

The Association feels that the decision of the Court of Appeals will have an adverse effect upon the collective bargaining process wherever used in this country in the resolution of conflicts between management and labor. This is true because the decision will encourage employees to disregard collective bargaining agreements made on their behalf by their union representatives.

The seniority provisions in issue are not unique. Similar seniority provisions are widely employed throughout the United States. But other types of seniority provisions are also used in other collective bargaining agreements in this country. There is no common industry practice as to use of a seniority system. Each collective bargaining agreement is tailored to a particular case, and they differ widely.

The Association feels that, in considering the petition for a writ of certiorari, the Court should be apprised of the wide-spread adverse impact which will result if the decision of the Court of Appeals is allowed to stand. The petitioner and the respondents are concerned only with the outcome of the special controversy between them as to whether the petitioner breached the particular collective bargaining agreement with the union—as to which the respondents seek damages. The National Association of Margarine Manufacturers does not believe that the nation-wide adverse effect of the decision of the Court of Appeals will be adequately presented by the parties. The radical effect of the decision of the Court of Appeals in

this case will extend far beyond its effect in settling the rights of the immediate parties involved. The Association, therefore, asks leave to file herein the annexed brief *amicus curiae.*

Respectfully submitted,

ASHLEY SELLERS
JESSE E. BASKETTE
1625 K Street, N. W.,
Washington 6, D. C.
Attorneys for National Association of Margarine Manufacturers

GEORGE C. DAVIS
1625 K Street, N. W.
Washington 6, D. C.
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Docket No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation, *Petitioner,*

AGAINST

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS AND MARCELLE KREISCHER, *Respondents.*

BRIEF OF THE NATIONAL ASSOCIATION OF MARGARINE MANUFACTURERS (AMICUS CURIAE ON BEHALF OF PETITIONER)

INTRODUCTION

The National Association of Margarine Manufacturers is a national, nonprofit trade association. Many of its members manufacture other products as well as margarine. A substantial number of its members engage in multi-state operations and have manufacturing plants in more than one state. Also, from time to time, its members change their methods of operation by closing down one plant and by transferring operations to another existing plant or to new plants opened in new areas, or by transferring a segment of the business of a plant to a new or existing plant.

One of the primary concerns of the members of the Association is the maintenance of good relations with

their employees. The members of the Association have an immediate interest in the promotion of the collective bargaining process as a means of arriving at agreements affecting employee-employer relations.

One of the purposes of the Association is the articulation of the concern of its members in matters as to which there is a common interest. Nowhere is this interest more direct than in the field of labor relations, particularly as it relates to the collective bargaining process as a means of providing stable labor conditions. The use of varied types of seniority provisions in collective bargaining agreements—tailored to fit particular needs—is common among the business community of the nation of which the members of the Association form an integral part. If this collective bargaining process—a bulwark of our economy—is to survive, it is essential that both parties to such agreements should abide by decisions reflected in such agreements.

Because the Association perceives in the decision of the Court of Appeals an adverse impact upon the integrity of the collective bargaining process which extends far beyond the vital rights of the petitioner in the case at bar, the Association respectfully submits this brief.

The decision of the Court of Appeals, in effect, tells the respondents that they do not have to abide by the collective bargaining agreement involved in the case at bar but, instead, that they may sue the petitioner for an alleged breach of an implied provision which admittedly is not in the express terms of the agreement. Moreover the implied provision read into the agreement by the Court of Appeals is at variance with the

prior conduct of the parties, and is not supported by any general practice in the industry in view of the wide variability of seniority provisions employed in contracts of this type. The decision, unless reversed, will breed further litigation by encouraging other employees likewise to disregard their collective bargaining agreements as written and seek to rely upon still other "implied" provisions if they can convince other courts, as they did the Court of Appeals in the case at bar, that such implied provisions are "humane" or "rational."

Already, the decision of the Court of Appeals has influenced another court in a different part of the country. On July 5, 1961, Judge Fred W. Kaess of the United States District Court for the Eastern District of Michigan, Southern Division, in *Oddie* v. *Ross Gear and Tool Company, Inc.* (Civil No. 21350, Unreported, see 30 Law Weekly 2031), stated that he felt bound by the decision of the Court of Appeals herein. He thus ignored a decision of the United States Court of Appeals for the Sixth Circuit holding that rights created by a collective bargaining agreement do not extend beyond its termination. *Elder* v. *New York Cent. R. Co.* (CCA 6, 1945), 152 F. 2d 361, 364. Although there seem to be some factual distinctions between the two cases, the important point for this Court to consider is that the Michigan Judge stated that he felt bound by the decision of the Court of Appeals in the case at bar.[1]

---

[1] Both the Court of Appeals and the Michigan District Court apparently felt that their decisions were, in some way, justified because of their conclusion that the seniority rights of the employees respectively involved were "vested." This is the essence of what Dean Roscoe Pound calls "mechanical jurisprudence." He has

The Association files this brief in support of the petition for a writ of certiorari because it believes that it is incompatible with the broad national public interest to encourage the judicial reformation of collective bargaining agreements as was done by the Court of Appeals in the case at bar. It is in the interest of employers and employees everywhere for the courts to encourage the collective bargaining process, involving, as it does, the reaching of agreements by compromise with the understanding that the parties will abide by the agreements when reached.

I.

Unless Reversed, the Decision of the Court of Appeals Will Upset Existing Agreements Between Employers and Employees Respecting Seniority Provisions and Will Frustrate Future Efforts to Make Such Agreements.

The decision of the Court of Appeals has shocked the business community by casting a litigious cloud over many existing labor agreements made through the collective bargaining process and injecting an element of uncertainty into such future labor agreements. The effect of the decision is to frustrate the attempt of petitioner—and of employers generally—to make a definitive agreement with its employees restricted to employment at a specific plant.

It has been repeatedly pointed out that collective bargaining requires that the parties involved deal with

---

stated that, "Current decisions and discussions are full of such solving words: estoppel, malice, privity, implied, intention of the testator, vested, and contingent—when we arrive at these we are assumed to be at the end of our juristic search. Like Habib in the Arabian Nights, we wave aloft our scimitar and pronounce the talismanic word." Pound, *Mechanical Jurisprudence*, reprinted from 8 Columbia Law Review 605 (1908) in "Landmarks of Law", Harper Brothers (1960), page 101, at page 111.

each other with an open and fair mind and, in good faith, endeavor to overcome obstacles or difficulties existing between them so that employment relations may be stabilized and obstructions to the free flow of commerce prevented. *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U.S. 332 (1938); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 (1938); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514 (1941).

In *Rapid Roller Co.* v. *National Labor Relations Board* (CCA 7, 1942), 126 F. 2d 452, 459, the Court aptly pointed out that

> Edmund Burke once said: "All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter."

An essential element of the collective bargaining process is that decisions once made and reflected in such agreements shall, in good faith, govern the relations of the parties thereafter.

With respect to seniority provisions, wide variations exist in seniority systems used in this country. See *Aeronautical Industrial District Lodge 727* v. *Campbell et al.*, 337 U.S. 521, 526-27 (1949). Judge Edmund L. Palmieri of the United States District Court for the Southern District of New York, whose decision was reversed by the Court of Appeals in the case at bar, took careful note of the variabilities in seniority systems prevalent in the United States. He pointed out that not only are different systems employed with respect to the unit to be covered, but that also there are different systems dealing with the issue of interplant seniority. The Court of Appeals gave no considera-

tion at all to this crucial circumstance. Instead, that Court held that there was an implied condition of the collective bargaining agreement that seniority rights created by the contract, and specified in the contract to be applicable to employees at the Elmhurst plant, survived the termination date of the agreement and of the employment by petitioner of respondents. This conclusion was reached by the Court of Appeals in the admitted absence of any specific provision of the contract to such effect and in the face of language in the agreement specifically limiting the applicability of the bargaining agreement to the Elmhurst plant.

Relations between management and labor are premised upon an atmosphere of compromise when collectively they bargain each with the other for the important emblements of their relationship. Collective bargaining is directed toward the end of stabilizing the employment relation. Clearly, in the case at bar, the Court of Appeals has swept aside the agreement made by the parties and has encouraged the respondents, and others similarly situated, to pursue rights not specified by the agreement. This is not only destructive to stability in employment relations but also obstructs the free flow of commerce contrary to the national labor policy.

II.

The Court of Appeals, Under the Guise of Construing the Collective Bargaining Agreement Herein, Actually Substituted Its Judgment As To What the Parties To the Agreement Should Have Provided As To the Preservation and Transferability of Seniority Rights.

The Trial Court correctly held that the instant agreement meant what it said—that it was conditioned upon the continuance of the collective bargaining agreement and the employment of respondents at Elm-

hurst. When this agreement and relationship of employment were lawfully terminated in good faith—and this much is conceded by respondents—, the seniority rights of respondents ceased to exist and they were not transferable, as a matter of law, to petitioner's new operation at Bethlehem. The Court of Appeals has not only eviscerated from the collective bargaining agreement the specific and clear limitation of its scope —the preamble of which stated that the agreement was made by the petitioner

> for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York

—but also the Court of Appeals frankly interpolated into the agreement what is considered "the more rational, not to say humane, construction of [the] contract" which appealed to the subjective judgment of that Court.

It clearly made a judicial reformation of the contract so as to make the agreement conform to what that Court felt the parties should have done. The Court of Appeals thus ignored the jurisprudentially sound doctrine that the duty of a court is to construe contracts as written and not to make new contracts for the parties thereby binding them to new terms and obligations to which they have not bound themselves. *Lanusse* v. *Barker,* 3 Wheat. (16 U.S.) 101 (1818); *Memphis & L. R.R. Co.* v. *Southern Express Co.,* 117 U.S. 1 (1886); *Osborn* v. *Nicholson et al.,* 13 Wall. (80 U.S.) 654 (1871); *Green County* v. *Quinlan,* 211 U.S. 582 (1909); *Sheets* v. *Selden,* 7 Wall. (74 U.S.) 416 (1868); *Calmar S.S. Corp.* v. *Scott,* 345 U.S. 427 (1953).

It is essential to the business community that these fundamental principles shall continue to govern commercial intercourse. Neither abstract justice nor the most extreme extension of any rule of liberal construction justified the Court of Appeals in interpolating into the contract an implied provision for the survival and transferability of seniority rights after the collective bargaining agreement and individual employment contracts of the respondents were admittedly lawfully terminated in good faith.

Professor (now Solicitor General) Archibald Cox has rightly pointed out that a collective bargaining agreement essentially is a form of contract and that it is entitled to enforcement by the courts and that

> A collective bargaining agreement does not imply a promise that the employer will not deprive the union and the employees of its benefits by closing an obsolete plant or dropping an unprofitable line of commerce. (Archibald Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich. L. Rev. 1, 31.)

This Court has also held that it will not stretch the language of a contract so as to read into it provisions which the parties have not included. *The Monrosa* v. *Carbon Black Export, Inc.,* 359 U.S. 180 (1959). Clearly, when a collective bargaining agreement, as in the case at bar, defines or limits the rights and obligations of the parties, it controls. No discretion is allowed to any court to weigh and apply equities in conflict with that contract, although such treatment may appeal to the "rational" and "humane" conceptions of the individual judges.

Seniority is contractual in nature and is not an inherent or natural or constitutional right. *Colbert* v.

Brotherhood of R. R. Trainmen (CCA 9, 1953), 206 F. 2d 9, 13, cert. den., 346 U.S. 931, rehearing den., 347 U.S. 924. "Accordingly, it is the almost universal rule that upon the termination of the instrument of their creation, seniority rights are at an end." (*Termination of Collective Bargaining Agreements—Survival of Earned Rights,* 54 N.W. U.L. Rev. 646, 649 (1959).)

There is no doubt that the actual collective bargaining agreement involved in the case at bar was, as held by the Trial Judge, limited expressly to Elmhurst—just as many such contracts of a multi-plant company are limited to one plant or, even, to one department of a plant.

The Court of Appeals swept aside the Trial Court's determination on this dispositive point and suggested that the recital in the preamble of the agreement that it was made for and on behalf of the petitioner's facilities located at Corona Avenue and 94th Street, Elmhurst, was a mere recital "analagous to the *descriptio personae* familiar to the law." Likewise, the Court of Appeals suggested that, if this language meant what the Trial Court said it meant, difficulties would arise in the event the plant were removed from 94th Street to 93rd Street in Elmhurst. If such a removal happened, reasoned the Court of Appeals, ". . . an entire structure of valuable legal rights would tumble down."

It is plain from what the Court of Appeals said that it thus rejected the Trial Court's judgment in part by indulging in suppositions as to how the collective bargaining agreement would have been applied in a hypothetical situation not before that Court.

This Court has declared that "* * * Courts deal with the cases upon the basis of the facts disclosed, never

with non-existent and assumed circumstances." See *Electric Bond and Share Company* v. *Securities & Exchange Comm'n,* 303 U.S. 419, 443 (1938); *Chicago Board of Trade* v. *Olson,* 262 U.S. 1, 42 (1923). Here, as in *First National Bank* v. *Beach,* 301 U.S. 435, 438 (1937), it may be said that "* * * Hypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case * * *."

III.

The Decision of the Court of Appeals Is Contrary to the Policy of Our National Labor Laws

The decision of the Court of Appeals unsettles previously well established principles upon which companies, unions, and employees have come to rely in the conduct of their interrelated affairs. It brings into question the statutory scheme of collective bargaining, itself, potentially affects every collective bargaining relationship in the country, and tends to disrupt rather than to effectuate the policy of our National Labor Laws as manifested in the Labor Management Relations Act, 1947, as amended (61 Stat. 136; 29 U.S.C. 141 *et seq.*). A fundamental part of this congressional policy is to encourage the practice and procedure of collective bargaining. In deciding that respondents were entitled to employment at the new Bethlehem plant, with seniority in accordance with the terms of the expired collective bargaining agreement covering their employment at another plant at Elmhurst which was closed, the Court of Appeals also swept aside procedures developed by the National Labor Relations Board in carrying out its statutory responsibility to

investigate and determine questions of employee representation and to enforce statutory ground rules governing the collective bargaining process. *Ibid.*, 29 U.S.C. 151, 157, 158(a)(1) and (5), 158(b)(1) and (3), 159(a) and (c).

CONCLUSION

The circumstances which make the case at bar so important to the business community at large, therefore, are that, if allowed to stand, the decision of the Court of Appeals (1) will cast a legal cloud over numerous outstanding labor contracts containing seniority provisions limited in scope to particular plants, thereby encouraging litigation; and (2) the decision will create uncertainty in the collective bargaining process in the future since, no matter how explicit may be the labor agreement as to its geographical applicability, neither party can be certain that its scope will not thereafter be changed by the courts according to their judicial conception of how the contract should have been written.

Today, both labor and management are sophisticated in the negotiation of collective bargaining agreements. Sometimes a collective bargaining agreement, like a commercial contract in general, does not spell out all of the possible matters which could be covered by that agreement; and, at other times, the parties to a collective bargaining agreement are unable to compose their differences on a particular point by compromise and deliberately omit it from the agreement. The whole process of collective bargaining will inevitably break down if, after such agreements are reached, the courts substitute their views as to what is "humane" or "rational" for what the parties actually provided.

To paraphrase the words of Mr. Justice Frankfurter, when discussing the appropriate function of a court in construing statutes, a judge must not use the words of a collective bargaining agreement as empty vessels into which he can pour anything he will—"his caprices, fixed notions, even statesmanlike beliefs in a particular policy", and, likewise, the collective bargaining agreement being construed must not be read by way of creation. (Frankfurter, *Some Reflections on the Reading of Statutes,* reprinted from 2 Record 213 (1947) in "Landmarks of Law", Harper Bros. (1960), 210, at pages 212, 216.)

It is desirable from both the standpoint of management and of labor for representatives of each to be able to make such labor agrements as they deem proper to meet their particular situations. The decision of the Court of Appeals strikes at the heart of this concept. This Court should, therefore, grant the petition for certiorari and consider the issues of such widespread public importance thereby presented.

Respectfully submitted,

ASHLEY SELLERS,
JESSE E. BASKETTE,
1625 K Street, N. W.
Washington 6, D. C.
Attorneys for National Association of Margarine Manufacturers

GEORGE C. DAVIS,
1625 K Street, N. W.
Washington 6, D. C.
Of Counsel